

**A Export-Import Bank of Malaysia Bhd v Seeco Engineering for
 Sewerage and Environmental Co Ltd & Ors**

**B HIGH COURT (KUALA LUMPUR) — SUIT NO 22 NCC–617 OF 2011
 NALLINI PATHMANATHAN J
 2 MAY 2012**

**C *Contract — Agreement — Facility agreement — Allegation of breach of terms of
 agreement — Whether failure to comply with terms of agreement affected validity
 of corporate guarantee — Whether breaches resulted in releasing fourth defendant
 from corporate guarantee provided in favour of plaintiff***

**D *Contract — Guarantee — Liability of corporate guarantor — Whether fourth
 defendant discharged or released from observing terms of guarantee***

**E After the first defendant was awarded a project by the government of Sudan, it
 approached the plaintiff bank for a loan facility. The plaintiff granted the first
 defendant the loan facility and a facility agreement was executed by the parties.
 In order to secure the facility the second, third and fourth defendants were also
 required to provide a corporate guarantee in favour of the plaintiff. When the
 first defendant failed to service the loan facility, the plaintiff issued letters of
 demand to all the defendants. The plaintiff then commenced the present action
 against the defendants and entered judgments in default against the first,
 second and third defendants. The fourth defendant, the holding company of
 the first defendant, filed its defence and the matter proceeded to trial. In its
 defence the fourth defendant claimed that the plaintiff failed to comply with a
 condition precedent as well as other conditions of the facility agreement. The
 cumulative effect of the fourth defendant's argument was that the breaches
 committed by the plaintiff resulted in releasing the fourth defendant from the
 corporate guarantee. The fourth defendant also had a counterclaim alleging
 that its image as a listed company had been tainted as a result of the plaintiff's
 action.**

H **Held, allowing the plaintiff's claim and dismissing the defendant's
 counterclaim with costs:**

**I (1) The fourth defendant's argument that it was a condition precedent of the
 facility agreement that a complete cash flow had to be given before the
 plaintiff disbursed any monies from the loan facility was without basis. A
 perusal of the facility agreement showed that there were no prescribed
 conditions in the facility agreement in relation to cash flow (see paras 13
 & 15).**

- (2) The fourth defendant's submission that the plaintiff had not verified whether the first defendant had obtained any approval from the Central Bank of Sudan for the project was without basis because the plaintiff had produced evidence that it was satisfied that the necessary approvals had been obtained. In any case, the facility agreement allowed the plaintiff to accept such documentation as it deemed fit to satisfy itself that the necessary approvals had been obtained. Further, no fault could be attributed to the plaintiff if the time line for the completion of the project had expired and no extension of time had been given by the government of Sudan. Instead, the fourth defendant ought not to have entered into the corporate guarantee if no extension of time had been procured by its subsidiary (see para 16). A B C
- (3) The fourth defendant's reliance on the fact that the plaintiff had made disbursements of 6% against actual physical work of only 1.7% to prove breach was unjustified. There was no duty on the plaintiff to certify the progress claim by flying out to Sudan to inspect the project itself and the imposition of such a duty would be unreasonable and onerous. In any case, the facility agreement did not provide that disbursement should be made either on a time-based or physical work-based approach. Further, none of these issues would defeat the fourth defendant's liability under the corporate guarantee (see para 17). D E
- (4) The fourth defendant's compelling contention that the facility agreement had no legal effect because cl 8.6 of the facility agreement, which dealt with the appointment of a project monitoring accountant ('PMA'), had not been complied with and that this in turn affected the corporate guarantee provided by the fourth defendant was a non-starter. Upon a plain reading of this clause it was found that the appointment of the PMA was not a condition precedent to the facility agreement. However, even if it was, cl 3.2 of the facility agreement provided that conditions precedent were for the benefit of the plaintiff and that compliance of it may be waived by the plaintiff at its discretion. Thus, the facility agreement was wide enough to ensure that the failure to appoint the PMA at the material time did not affect the corporate guarantee. As such, the fourth defendant was not in any event or under any circumstances, discharged or released from observing the terms of the guarantee and the plaintiff could enforce the guarantee against it (see paras 19–21, 23, 25 & 28). F G H
- (5) The nature of the fourth defendant's counterclaim was such that it would fail if the plaintiff's claim was allowed. It therefore followed that the counterclaim ought to be dismissed (see paras 6 & 34). I

[Bahasa Malaysia summary]

Selepas defendan pertama dianugerahkan projek oleh kerajaan Sudan, ia telah ke bank plaintiff untuk mendapatkan kemudahan pinjaman. Plaintiff

- A memberikan defendan pertama kemudahan pinjaman dan perjanjian kemudahan telah dimeterai oleh pihak-pihak. Dalam usaha untuk mendapatkan kemudahan, defendan kedua, ketiga dan keempat juga dikehendaki untuk menyediakan jaminan korporat yang memihak kepada plaintif. Apabila defendan pertama gagal membayar balik kemudahan
- B pinjaman, plaintif mengeluarkan surat tuntutan kepada kesemua defendan. Plaintif kemudiannya memulakan tindakan ini terhadap defendan dan memasukkan penghakiman ingkar terhadap defendan pertama, kedua dan ketiga. Defendan keempat, syarikat induk defendan pertama, memfailkan pembelaannya dan perkara tersebut diteruskan untuk perbicaraan. Dalam
- C pembelaannya defendan keempat mendakwa bahawa plaintif gagal untuk mematuhi syarat terdahulu serta syarat-syarat lain perjanjian kemudahan. Kesan kumulatif hujah defendan keempat adalah bahawa kemungkiran yang dilakukan oleh plaintif menyebabkan pelepasan defendan keempat daripada jaminan korporat. Defendan keempat juga membuat tuntutan balas dengan
- D mendakwa bahawa imejnya sebagai perbadanan tersenarai telah tercemar akibat tindakan plaintif.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan dengan kos:

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- (1) Hujah defendan keempat bahawa adalah menjadi syarat duluan perjanjian kemudahan bahawa aliran tunai yang lengkap harus diberikan sebelum plaintif mengeluarkan apa-apa wang daripada kemudahan pinjaman adalah tidak berasas. Penelitian ke atas perjanjian kemudahan menunjukkan bahawa tidak ada syarat-syarat yang ditetapkan dalam perjanjian kemudahan berhubung dengan aliran tunai (lihat perenggan 13 & 15).
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- (2) Hujah defendan keempat bahawa plaintif tidak mengesahkan sama ada defendan pertama telah mendapat apa-apa kelulusan dari Bank Negara Sudan bagi projek tersebut adalah tidak berasas kerana plaintif telah mengemukakan bukti bahawa ia berpuas hati bahawa kelulusan yang diperlukan telah diperolehi. Dalam apa jua keadaan, perjanjian kemudahan membenarkan plaintif untuk menerima dokumentasi yang dianggap patut untuk memuaskan hatinya bahawa kelulusan yang diperlukan telah diperolehi. Selanjutnya, kesalahan tersebut tidak boleh dikaitkan dengan plaintif jika garis masa untuk menyiapkan projek telah tamat dan tiada lanjutan masa diberikan oleh kerajaan Sudan. Sebaliknya, defendan keempat tidak sepatutnya dimasukkan ke dalam jaminan korporat jika tiada lanjutan masa telah diperolehi oleh anak syarikatnya (lihat perenggan 16).
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- (3) Sandaran defendan keempat kepada fakta bahawa plaintif telah membuat pengeluaran sebanyak 6% terhadap kerja fizikal sebenar yang hanya 1.7% untuk membuktikan pelanggaran tidak berjustifikasi. Tiada

- kewajipan untuk plaintif mengesahkan tuntutan progresif dengan terbang ke Sudan untuk memeriksa projek sendiri dan pengenaan apa-apa kewajipan akan menjadi tidak munasabah dan membebaskan. Dalam apa jua keadaan, perjanjian kemudahan tidak memperuntukkan bahawa pembayaran yang perlu dibuat sama ada berasaskan masa atau kerja fizikal. Di samping itu, isu-isu ini akan mengalahkan liabiliti defendan keempat di bawah jaminan korporat (lihat perenggan 17). A
- (4) Hujah defendan keempat bahawa perjanjian kemudahan tersebut mempunyai kesan undang-undang kerana klausa 8.6 perjanjian kemudahan tersebut, yang membincangkan mengenai pelantikan seorang akauntan projek pemantauan ('PMA'), telah tidak dipatuhi dan bahawa ini seterusnya menjejaskan jaminan korporat yang disediakan oleh defendan keempat adalah bukan permulaan yang baik. Pembacaan biasa fasal ini mendapati bahawa pelantikan PMA bukan satu syarat duluan kepada perjanjian kemudahan. Walau bagaimanapun, jika pun ya, klausa 3.2 perjanjian kemudahan memperuntukkan bahawa syarat-syarat terdahulu adalah bagi manfaat plaintif dan bahawa pematuhannya boleh diketepikan oleh plaintif atas budi bicaranya. Oleh itu, perjanjian kemudahan adalah cukup luas dalam memastikan bahawa kegagalan untuk melantik PMA pada masa material tidak menjejaskan jaminan korporat. Oleh itu, defendan keempat tidak berada dalam apa jua keadaan atau di bawah sebarang keadaan, terlepas atau bebas daripada memerhatikan terma jaminan dan plaintif boleh menguatkuasakan jaminan terhadapnya (lihat perenggan 19–21, 23, 25 & 28). B
- (5) Sifat tuntutan balas defendan keempat adalah seperti mana akan gagal jika tuntutan plaintif dibenarkan. Oleh itu, tuntutan balas seharusnya ditolak (lihat perenggan 6 & 34).] C
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Notes

For cases on facility agreement, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2818–2820. G

For cases on liability of guarantor, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4746–4756.

Cases referred to

- Cheah Swee Fah v Bank Bumiputra Malaysia Bhd & Anor* [2007] 7 MLJ 481; [2008] 3 CLJ 132, CA (refd) H
- Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, FC (refd)
- Coronation Electronics Ltd v Lalchand Mahtani* [1987] 1 MLJ 190 (refd)
- Danaharta Managers Sdn Bhd v Huang Ee Hoe & Ors* [2002] 2 MLJ 424; [2002] 3 CLJ 258, HC (refd) I
- Holme v Brunskill* (1877) 3 QBD 498, CA (refd)
- Ke Seng Enterprise Sdn Bhd v Lembaga Pembangunan Perumahan dan Bandar* [2010] MLJU 148; [2011] 2 CLJ 228, HC (refd)

- A** *Kejutaan Holdings Sdn Bhd v Magnum 4D (Perak) Sdn Bhd & Ors* [2010] 3 MLJ 827; [2009] 6 CLJ 570, CA (refd)
Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors [1990] 1 MLJ 485, SC (refd)
Malayan Banking Bhd v Mawai Products Sdn Bhd (in receivership) & 3 Ors
B [1994] MLJU 327; [1995] 1 BLJ 43, HC (refd)
National Bank of Nigeria Ltd v Awolesi [1964] 1 WLR 1311, PC (refd)
Utama Merchant Bank Bhd v GKM Wilayah-Prescon Sdn Bhd & Ors [2008] MLJU 723; [2009] 7 CLJ 357, HC (refd)

C Legislation referred to

Contracts Act 1950 ss 24, 86
Evidence Act 1950 s 114(g)

Mohd Munzeer (Zulpadli & Edham) for the plaintiff.

- D** *NoorHazury (Mohaji with him) (Mohaji, Hazury & Ismail) for the defendant.*

Nallini Pathmanathan J:

INTRODUCTION

- E** [1] The plaintiff in this case, Export-Import Bank of Malaysia Bhd has brought this claim against the defendants, Seeco Engineering for Sewerage And Environmental Co Ltd ('the first defendant'), Impact Forte Sdn Bhd ('the second defendant'), Khartoum For Water and Services Co Ltd ('the third defendant') and PJBumi Bhd ('the fourth defendant') for the repayment of the facility agreement granted by the plaintiff to the first defendant in the sum of USD3,838,473.93 whereby the second to the fourth defendants provided corporate guarantees.

G BACKGROUND FACTS

- H** [2] Briefly, the facts of the present case can be summarised as follows. The first defendant was awarded a project called the 'East Omdurman Sewerage Project' in Khartoum, Sudan by the Government of Sudan. The plaintiff, Export-Import Bank of Malaysia Bhd ('EXIM'), came into the picture at the request of the first defendant who requested for a loan facility. The plaintiff granted the loan facility and a facility agreement dated 4 December 2006 was signed with the first defendant. To secure the facility, the second, third and fourth defendants were required to provide a corporate guarantee in favour of the plaintiff.

I [3] Two drawdowns in the form of USD2,354,798.50 and USD1,380,610.84 respectively was made by the first defendant on 26 March 2007 and 18 May 2007. It is pertinent to add here that on 1 June 2007, Messrs

Jamal Amin & Partners was appointed as the project monitoring accountant ('PMA'). Subsequently, the PMA audited the third drawdown application made by the first defendant whereby the plaintiff was cautioned about the presence of certain irregularities.

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[4] The first defendant failed to service the loan facility and on 19 January 2009, the plaintiff issued letters of demand to all the defendants. On 25 October 2010, the first defendant informed the plaintiff that the concession agreement with the Government of Sudan had been terminated. Once again, the plaintiff issued letters of demand to all the defendants on 14 January 2011.

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THE CLAIM

[5] The plaintiff commenced the present action on 6 April 2011. Judgments in default were obtained against the first, second and third defendants. The fourth defendant filed its defence and the matter proceeded for trial. This decision is therefore in respect of the plaintiff's action against the fourth defendant in the sum of USD3,838,473.93 (calculating at the rate of USD1:RM3.1575 according to BNM's website would be equivalent to RM12,119,981.43).

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THE DEFENCE OF THE FOURTH DEFENDANT

[6] The fourth defendant alleged that there had been several non-compliances by the parties as determined under the facility agreement between the plaintiff and the first defendant, including one which the fourth defendant asserts to be a condition precedent to the facility agreement. It was also contended that the facility agreement between the plaintiff and the first defendant had been substantially varied without the consent of the fourth defendant. The cumulative effect of the fourth defendant's argument is that the corporate guarantee executed by it cannot be enforced by the plaintiff. The fourth defendant also has a counterclaim alleging that its image as a listed company in Bursa Malaysia had been tarnished as a result of this action and has made claim for several declarations the essence of which would effectively defeat the plaintiff's claim. Indeed, the nature of the fourth defendant's counterclaim is such that if the plaintiff's claim is allowed, the counterclaim must necessarily fail.

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THE TRIAL

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[7] The trial of this matter took place over three days. The plaintiff called two witnesses, namely Sharidah Hanafiah, a manager at the Special Assets Management Department of the plaintiff ('PW1'), and Md Zaini bin Md Saat, the former relationship manager with the Cross Model Department of the

A plaintiff ('PW2') to testify on its behalf. The defendant also called two witnesses in support of its defence and counterclaim, namely Hamsiah bt Khalid, an accounts officer and company secretary of the fourth defendant, ('DW1'), Mohd Ridzuan bin Abdul Aziz, an auditor at Messrs Jamal Amin & Partners ('DW2').

B THE ISSUES

C [8] Both parties have identified numerous issues which ought to be determined by the court which are generally of a similar nature. In summary it is contended that the plaintiff failed or neglected to comply with what is termed a 'condition precedent' as well as other 'conditions' of the facility agreement dated 4 December 2006. It is also contended that there has been a unilateral variation of the facility agreement without the consent of the fourth defendant guarantor. This it is contended warrants a release from the corporate guarantee. The net effect however of the entirety of the defence as I understand it is that the corporate guarantee does not bind the fourth defendant. Each of the issues raised by the fourth defendant as well as the response of the plaintiff is considered below.

E (i) *Non-compliance with the conditions in the facility agreement*

F [9] First, I would consider the instances of non-compliance of the facility agreement by the plaintiff as raised by the fourth defendant (which incidentally is largely intertwined with the latter's counterclaim). DW1 contended in the course of her testimony at trial that the loan facility was disbursed in spite of the following facts, namely:

- (a) there was incomplete cash flow;
- G (b) there was no approval from the Central Bank of Sudan for the project;
- (c) the time line accorded for the completion of the project had expired on 15 May 2007 and there was no follow up on the extension time given by the Government of Sudan;
- H (d) the actual physical work completed was only 1.17% even though 6% had been drawn-down and disbursed;
- (e) USD3.3m was used solely for consultancy fees (which was disbursed on time-based work and not physical-based work); and
- I (f) there was no proof that the first defendant had increased its capital to USD2m before disbursement as required under the facility agreement.

[10] The plaintiff's response to the fourth defendant's assertion was that the latter had failed to adduce any evidence to support their claim at trial. Indeed,

DW2 who is the representative from PMA, testified that no findings were made by the PMA in respect of the first and second drawdown as the findings were made specifically in respect of the third drawdown. DW1 admitted the same as well. It is relevant at this stage to highlight that DW1 had no knowledge whatsoever of any of the events giving rise to this claim and defence. In fact the entire shareholding of the fourth defendant was taken over by the current shareholders in or around the end of 2007 after the events pertaining to this claim had transpired. Therefore, the witnesses called by the fourth defendant had no personal or direct knowledge of matters pertaining to the dispute. Notwithstanding this, the fourth defendant chose not to call any of the witnesses who were then officers and shareholders in the company to testify in support of its defence. The net result was that the evidence of DW1 is effectively hearsay and very little if any, weight can be accorded to her evidence.

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[11] DW2's evidence, on the other hand, is relevant but can only be so for matters arising in respect of the third drawdown onwards as they were appointed at this juncture. The allegations made by the fourth defendant were based on the PMA findings in relation to the third drawdown at that point in time. It is common ground that the third drawdown did not materialise. Indeed, as the findings by the PMA were specifically confined to the third drawdown, I find it difficult to conceive that the findings made by the PMA could conclusively establish that there were any irregularities or negligence on the part of the plaintiff in respect of the first and second drawdown.

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[12] Nevertheless, I shall consider each of the fourth defendants defences in turn.

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Incomplete cash flow

[13] In respect of the argument of the incomplete cash flow, it is not a condition precedent in the facility agreement that a complete cash flow be given before disbursement. A perusal of the facility agreement provides in cl 3.1 that the conditions precedent imposed by the plaintiff on the defendants are as set out in Schedule 1 to the facility agreement. Schedule 1 does not prescribe conditions in relation to cash flow. There is therefore no basis to submit that this comprises a condition precedent. As such, there was no duty imposed on the plaintiff to verify the completeness of the cash flow. The fourth defendant bases this line of defence on a statement made by DW2 in the course of his testimony where he stated that as far as he could remember the cash flow for the project was less than perfect. This statement in itself does not warrant an argument that defeats the plaintiff's claim. Rather it points out that the first defendant failed to deal with the loan monies properly or regularly. This does not amount to any form of default on the part of the plaintiff. In any event DW2's statement would appear to amount to opinion evidence in relation to

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- A how the finances and cash flow of the project should ideally have been dealt with.

Approval from the Central Bank of Sudan

- B [14] As for the approval from the Central Bank of Sudan, the plaintiff produced confirmation by way of a letter from a firm of solicitors TARIG ABD EL FT M of Sudan stipulating that the necessary approvals from the Central Bank of Sudan had been obtained. And as provided for in Schedule 1 of the facility agreement, documents 'acceptable to EXIM Bank evidencing the approvals' having been received by the plaintiff would be sufficient. I agree with the plaintiff's stance that it was satisfied that the necessary approvals have been obtained.

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- D [15] In any event cl 3.2 allows the plaintiff bank to waive any or all of the conditions precedent as it sees fit in relation to all the conditions specified in Schedule 1. In other words the plaintiff was at all times at liberty to choose to either insist or to waive any one or all of the conditions precedent so set out in Schedule 1. The net result is that in relation to this issue, the plaintiff was at liberty to accept such documentation as it deemed fit to satisfy itself on this condition precedent. It was not necessary for the plaintiff to hear directly or in person from the solicitors on this issue. This contention on the part of the fourth defendant is therefore without basis.

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- F Expiry of project

- G [16] It is further contended by the defendant in its defence that the time line accorded for the completion of the project had expired on 15 May 2007 and there was no follow up on the extension time given by the Government of Sudan. However this issue was not pursued specifically at trial. In any event the fact that there had been no attempt to procure an extension of time was a matter solely within the knowledge and purview of the first defendant and not the plaintiff. Further the fourth defendant as a related entity, ie the holding company of the first defendant which is, in other words the wholly owned subsidiary of the fourth defendant was in also in a position to have knowledge of this fact. Again, no fault can be attributed to the bank for any such expiry. It has in any event no nexus with the repayment of loan monies and the guarantee afforded by the fourth defendant. In any event the fourth defendant ought not to have entered into the corporate guarantee if indeed there was no extension of time had been procured by its subsidiary. The fourth defendant cannot approbate and reprobate at the same time. This doctrine comes from the maxim quod approbo non reprobo which means 'that which I approve, I cannot disapprove'. This ground is also a non-starter.
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Disbursement of 6% against physical work done of 1.7%

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[17] In response to the concern that disbursements of 6% were made despite actual physical work being only 1.17%, indeed PW1 had testified that a substantial part of the first and second draw downs were made to pay for preliminary works. The plaintiff relied on documentation in making the disbursements as the project was far away in Sudan. The said documentation (ie progress claim) was certified by United Consultants and Associates ('UCA') which was appointed by the first defendant. There was no duty on the Plaintiff to certify the same, by flying out to inspect the project itself. To impose such a duty would indeed be unreasonable and onerous. In any event this was never within the contemplation of the parties to begin with (*Cheah Swee Fah v Bank Bumiputra Malaysia Bhd & Anor* [2007] 7 MLJ 481; [2008] 3 CLJ 132) — 'To impose on the bank any duty to ascertain the actual situation at the site or even for it to make inquiries would place an onerous duty on the bank. It could not be said that the first defendant was in breach of any of its duties in the absence of clear evidence that it was aware of the actual situation or that there was something amiss in the architect's certificate when it made the payment (per Zulkefli Makinuddin JCA as His Honourable Lordship then was). Again, I find it hard to comprehend how this could reflect any breach on the part of the plaintiff. In similar vein, I find that nowhere is it provided under the facility agreement that disbursement should be made either on a time-based or physical work-based approach. I find that this too was a matter of conjecture on the part of the fourth defendant which does not reflect any neglect on the part of the plaintiff. More importantly the fourth defendant's liability hinges on it having executed the corporate guarantee. None of these issues has the effect of defeating the said guarantee. These are matters which might have been raised by the first defendant as the borrower, and even then with little prospect of success.

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Increase in capital of the first defendant

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[18] Lastly, as to the increased capital of the first defendant, PW1 had testified that all the conditions had been complied with, including the condition precedent of para 10 of Schedule 1 of the facility agreement. Indeed, vide a circular issued by the fourth defendant (shareholder circulate dated 6 June 2007), it was clearly stated that 'On 26 November 2006, SEECO (ie the 1st Defendant) increased its issued and paid-up capital to SD420,000,000 (approximately RM7,143,857)'. The prevailing exchange rate of USD1:RM3.40 at the material time would have brought it to slightly above USD2m. Therefore, this contention must also fail.

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(ii) *Non-compliance with cl 8.6 of the facility agreement*

[19] Next, I shall consider whether the non compliances alleged by the

- A fourth defendant had effectively resulted in the facility agreement having no legal effect, thereby affecting the corporate guarantee provided by the fourth defendant. The most compelling contention brought by the fourth defendant was that cl 8.6 of the facility agreement which deals with the appointment of a PMA had not been complied with. The fourth defendant alleges that this was a condition precedent to the facility agreement. It is necessary for cl 8.6 to be reproduced at this juncture:
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The Borrower shall appoint the Project Monitoring Accountant to undertake the following task:

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- (i) Monitor closely the connecting charges and monthly fees received from the project;
 - (ii) Provide monthly cash-flow report on the cash-flow position of the Borrower's operation, on monthly basis to EXIM BANK; and
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- (iii) Other functions as EXIM BANK may decide at its own discretion from time to time.

- E [20] A plain reading of the said provision clearly indicates that this duty is incumbent on the first defendant. Thus, the fourth defendant's contention that the plaintiff failed to observe this duty is a non-starter. Indeed, PW1 also testified the same at trial. This is further supported by the letter of undertaking issued by the first defendant on 8 March 2007 to appoint the PMA, which was right before the first drawdown. The appointment letter issued by the first defendant was formed by DW2 himself, who was from the PMA).
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- G [21] Similarly, the fourth defendant's assertion that cl 8.6 was a condition precedent to the facility agreement also does not hold water because as provided under cl 3.1 of the same, once all the conditions precedent as stipulated under Schedule 1 of the facility agreement have been complied with, the facility shall become available to the first defendant. The appointment of the PMA is not in Schedule 1, and therefore it cannot be deemed as a pre-requisite to the facility agreement. The words of the facility agreement are clear, plain and unambiguous and therefore this court has to give effect to the same (*Ke Seng Enterprise Sdn Bhd v Lembaga Pembangunan Perumahan dan Bandar* [2010] MLJU 148; [2011] 2 CLJ 228).
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- I [22] The parties have agreed to the various conditions which would be conditions precedent to the facility agreement and the appointment of the PMA was not one of them. Parties who enter into agreements are obliged to adhere to their terms (*Kejutaan Holdings Sdn Bhd v Magnum 4D (Perak) Sdn Bhd & Ors* [2010] 3 MLJ 827; [2009] 6 CLJ 570).

[23] Even if I am wrong on this point, I find that the duty under cl 8.6 is

placed on the borrower (which is the first defendant) to comply with. It is a provision which is favourable to the plaintiff. Indeed, the plaintiff may choose to waive its compliance (*Utama Merchant Bank Bhd v GKM Wilayah-Prescon Sdn Bhd & Ors* [2008] MLJU 723; [2009] 7 CLJ 357). However, in all fairness to the plaintiff, it must be stated that the plaintiff did nothing of that sort. And even assuming for a moment that cl 8.6 was a condition precedent, cl 3.2 provides that the conditions precedent were for the benefit of the plaintiff and compliance of it may be waived by the plaintiff at the plaintiff's discretion.

[24] Likewise, cl 19.6 of the facility agreement provides that the plaintiff may, at any time and without in any way affecting the facility agreement of the other security documents, grant any time or indulgence to the parties. Accordingly, even if the first defendant at failed to appoint the PMA at the material point in time, it was open to the plaintiff to grant an indulgence which would not affect the facility agreement or the incidental corporate guarantees. In this regard, from whichever point one seeks to address the fourth defendant's contention, it would certainly appear that the terms of the facility agreement do not support such a stance.

[25] I therefore have no hesitation to conclude that the facility agreement was wide enough to ensure that the failure to appoint the PMA at the material time did not affect the corporate guarantee. Indeed, it must be pointed out here that not only does the facility agreement have such an effect, but the corporate guarantee executed between the plaintiff and the fourth defendant does not indicate otherwise either. It is trite that 'a person who is not a party to a contract cannot claim benefit under the contract. Therefore the fact that money was released to the first defendant contrary to the terms of the loan agreement, or the relevant debenture, could not affect the liability of the 4th defendant towards the plaintiff under the guarantee. The guarantee should be read independently of the other agreement between the Plaintiff and the 1st defendant unless the guarantee itself provides otherwise which the guarantee here does not' (per Arifin Zakaria J, as the honourable Chief Justice then was, in *Malayan Banking Bhd v Mawai Products Sdn Bhd (in receivership) & 3 Ors* [1994] MLJU 327; [1995] 1 BLJ 43).

[26] In that case, there was a clause in the guarantee agreement which is similar to cl 4.1 of the corporate guarantee agreement in the present case. Clause 4.1 stipulates that any arrangement whatsoever accepted by the plaintiff, modifying the plaintiff's rights and remedies against the first defendant, whether with or without the assent of the fourth defendant, shall not discharge or release the fourth defendant from the guarantee agreement. The corporate guarantee agreement, as provided for under cl 2.1 of the same, imposes a duty on the fourth defendant to unconditionally and irrevocably guarantee the due performance of the obligations of the first defendant under

A the facility agreement as a continuing obligation. Over and above that, cl 2.2 of the same states that upon the occurrence of an event of default, the plaintiff is entitled to demand full repayment from the fourth defendant notwithstanding anything contrary contained in the facility agreement.

B [27] A case on point would be the case of *Danabarta Managers Sdn Bhd v Huang Ee Hoe & Ors* [2002] 2 MLJ 424; [2002] 3 CLJ 258. In that case, the guarantee in question was also an unconditional guarantee to pay on demand upon the happening of the event of default. Kang Hwee Gee J (as he then was) occasioned to say the following:

C ... the defendants had given the bank an unconditional guarantee that they would pay the bank on demand upon the happening of the 'event of default' which the borrower had failed therefrom to remedy.

D As such, the guarantee was clearly a demand guarantee. All that was required to activate the defendants' liability to pay in this case was the default of the borrower to which a demand had been made to the guarantors to pay.

E Except to serve the subsidiary purpose of providing a 'reference point' to determine their liability to pay, the guarantors' liability on the guarantee itself is independent of the facility agreement and any other agreements that the borrower or any third party had signed with the bank ...

F The fact that the borrower may have a claim against the bank in respect of its failure to comply with its promise to release the unused portion of the land secured under the debenture and the charge as provided under cl 11 of the facility agreement would not therefore discharge the guarantors from their obligation to pay.

G [28] I am of the view that the above observations are applicable to the present case with equal force. It is my considered view that the fourth defendant is not, in any event or under any circumstances, discharged or released from observing the terms of the guarantee. In any case, it is highly improbable for the fourth defendant to deny knowledge of state of affairs between the plaintiff and the first defendant. From the evidence adduced by PW1 and PW2, it is clear that the plaintiff had liaised with the fourth defendant. It was also disclosed that the first defendant and the fourth defendant shared common directorships at the material time. Furthermore, the turn-key contractor of the project, PJBumi Engineering Sdn Bhd, was a wholly owned subsidiary of the fourth defendant. Accordingly, the fourth defendant's contention that the facility agreement had been substantially varied and therefore discharging it from the guarantee agreement is simply not tenable.

I [29] First, there was no variation at all to the facility agreement, let alone a substantial variation. I have found that the appointment of the PMA was not a condition precedent to the facility agreement. In this connection, I find the authorities cited by the fourth defendant, namely ss 86 and 24 of the Contracts

Act and the case of *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors* [1990] 1 MLJ 485 to be of no assistance. Second, even if it were to be deemed as a substantial variation, it could only be said that such variation was done at the instance of the first defendant, namely the borrower (ie principal debtor), who was under a duty to appoint the PMA, and not the plaintiff. Thirdly, the facility agreement is wide enough to cover such a situation as an event of default where the facility agreement become ineffective, whereby monies previously advanced to the first defendant become due and payable to the plaintiff and that obligation is guaranteed by the guarantee agreement.

[30] Fourthly, by reason of the relations between the first defendant and the fourth defendant, namely the turn-key contractor of the project being the wholly owned subsidiary of the fourth defendant, and the fact that the first defendant and the fourth defendant had common directorships, I am of the view that the fourth defendant cannot in any event dispute being wholly aware and given implicit consent to such variation (see *Citibank NA v Ooi Boon Leong* [1981] 1 MLJ 282; *Holme v Brunskill* (1877) 3 QBD 498; *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311; *Coronation Electronics Ltd v Lalchand Mahtani* [1987] 1 MLJ 190). Moreover, even if there had been some variation, it is essentially the same contract which the fourth defendant had guaranteed.

[31] Accordingly, I am satisfied that the plaintiff's claim as prayed for ought to be allowed. It therefore follows that the defendant's counterclaim ought to be dismissed. I would, however, address two matters raised in the submission filed on behalf of the fourth defendant.

[32] First, it was submitted that s 114(g) of the Evidence Act 1950 ought to be invoked against the plaintiff for failure to call the directors of, the first and fourth defendants. This submission is unfounded because those witnesses are not relevant witnesses to prove the plaintiff's claim. The plaintiff has in fact succeeded in proving its case on a balance of probabilities premised on the evidence of its two witnesses. The onus then shifted to the fourth defendant to establish its defence and counterclaim. If the directors of the first and fourth defendants were material to the fourth defendant's defence these witnesses should in fact have been called by the fourth defendant, not the plaintiff. This submission is therefore without merit.

[33] Second, it was argued that the plaintiff had already obtained default judgments against the first, second and third defendants and yet to date have failed, neglected, and/or deliberately omitted to enforce or execute the judgments against them. To my mind, that is indeed entirely irrelevant. There is no law to compel a party to execute a judgment obtained in its favour. Moreover, the fourth defendant is on equal footing with the other defendants,

A ie jointly and severally liable for the said sum claimed for by the plaintiff. The plaintiff is at liberty to pursue the claim against the fourth defendant and execute the judgments obtained against the defendants either simultaneously or individually as it deems fit.

B CONCLUSION

C [34] Based on all the evidence adduced in the course of trial, it appears to this court that the plaintiff has established its case on a balance of probabilities. Therefore, the plaintiff's claim as prayed for is allowed, and the defendant's counterclaim is dismissed with costs to the plaintiff in the sum of RM50,000 (fifty thousand only).

Plaintiff's claim allowed and defendant's counterclaim dismissed with costs.

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Reported by Kohila Nesan

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